

(7)
No. 90-6105

Supreme Court, U.S.

FILED

SEP 9 1991

OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1991

JOHN H. EVANS, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

WILLIAM C. BRYSON
Deputy Solicitor General

CHRISTOPHER J. WRIGHT
Assistant to the Solicitor General

RICHARD A. FRIEDMAN
Attorney

*Department of Justice
Washington, D.C. 20530
(202) 514-2217*

52124

QUESTIONS PRESENTED

1. Whether petitioner was properly convicted of extortion under color of official right in violation of the Hobbs Act, 18 U.S.C. 1951, for agreeing, in exchange for a payment, to assist a developer in getting certain property rezoned.

2. Whether petitioner was properly convicted of tax fraud under 26 U.S.C. 7206(1) for failing to report a \$7000 cash payment on his income tax return.

TABLE OF CONTENTS

| | Page |
|--|------|
| Opinion below | 1 |
| Jurisdiction | 1 |
| Statutory provisions involved | 1 |
| Statement: | |
| 1. The undercover agent is introduced to petitioner.. | 3 |
| 2. The undercover agent seeks petitioner's help | 5 |
| 3. Petitioner solicits a payment from the under- cover agent and promises to assist in the rezon- ing effort | 6 |
| 4. Petitioner receives \$8000 and begins to work on the rezoning project | 9 |
| 5. The rezoning effort clears one hurdle but en- counters another | 11 |
| 6. Petitioner continues his efforts in support of the rezoning application, but the application is with- drawn | 12 |
| 7. Petitioner fails to report the \$7000 cash payment as a campaign contribution and denies having received the payment | 12 |
| 8. Petitioner is convicted of extortion and tax fraud | 13 |
| 9. Petitioner's convictions are affirmed | 16 |
| Summary of argument | 17 |
| Argument: | |
| I. Petitioner was properly convicted of extortion under color of official right | 20 |
| A. The jury was instructed that the government had to prove that petitioner intentionally and wrongfully induced the payment | 20 |
| 1. The majority rule: extortion under color of official right does not require that the public official induced the payment | 20 |
| 2. The minority position: extortion under color of official right requires "induce- ment" by the public official | 28 |

IV

| Argument—Continued: | Page |
|--|------|
| 3. The instructions in this case were consistent with the minority view that petitioner advocates | 31 |
| B. The jury was correctly instructed on the standard applicable to campaign contributions | 34 |
| C. The jury was properly instructed to focus on petitioner's actions and intentions | 36 |
| D. The evidence supports the jury's conclusion that petitioner wrongfully induced the payment by agreeing to exercise official power in return for the payment | 39 |
| II. The jury was properly instructed, and the evidence was sufficient, on the tax fraud count | 42 |
| Conclusion | 46 |

TABLE OF AUTHORITIES

Cases:

| | |
|---|------------------------|
| <i>Jackson v. Virginia</i> , 443 U.S. 307 (1979) | 39 |
| <i>McCormick v. United States</i> , 111 S. Ct. 1807 (1991) | 21, 25, 31, 34, 43, 44 |
| <i>Morissette v. United States</i> , 342 U.S. 246 (1952) .. | 24 |
| <i>People v. Dioguardi</i> , 8 N.Y.2d 260, 168 N.E.2d 683, 203 N.Y.S.2d 870 (1960) | 33 |
| <i>People v. Feld</i> , 262 A.D. 909, 28 N.Y.S.2d 796 (Sup. Ct. 1941) | 33 |
| <i>People v. Whaley</i> , 6 Cow. 661 (N.Y. Sup. Ct. 1827) .. | 23 |
| <i>Taylor v. United States</i> , 110 S. Ct. 2143 (1990) | 24 |
| <i>United States v. Aguon</i> , 851 F.2d 1158 (9th Cir. 1988) | 22, 23, 26, 28, 30, 33 |
| <i>United States v. Butler</i> , 619 F.2d 411 (6th Cir.), cert. denied, 447 U.S. 927 (1980) | 21 |
| <i>United States v. Campo</i> , 774 F.2d 566 (9th Cir. 1985) | 30 |
| <i>United States v. Culbert</i> , 435 U.S. 371 (1978) | 28 |
| <i>United States v. Dozier</i> , 672 F.2d 531 (5th Cir.), cert. denied, 459 U.S. 943 (1982) | 22, 36 |
| <i>United States v. Egan</i> , 860 F.2d 904 (9th Cir. 1988) | 30 |

V

| Cases—Continued: | Page |
|---|------------|
| <i>United States v. Enmons</i> , 410 U.S. 396 (1973) | 25 |
| <i>United States v. French</i> , 628 F.2d 1069 (8th Cir.), cert. denied, 449 U.S. 956 (1980) | 21 |
| <i>United States v. Garner</i> , 837 F.2d 1404 (7th Cir. 1987), cert. denied, 486 U.S. 1035 (1988) | 21 |
| <i>United States v. Hall</i> , 536 F.2d 313 (10th Cir.), cert. denied, 429 U.S. 919 (1976) | 21 |
| <i>United States v. Hathaway</i> , 534 F.2d 386 (1st Cir.), cert. denied, 429 U.S. 819 (1976) | 21 |
| <i>United States v. Holzer</i> , 816 F.2d 304 (7th Cir.), vacated, 484 U.S. 807 (1987), aff'd in part on remand, 840 F.2d 1343 (7th Cir.), cert. denied, 486 U.S. 1035 (1988) | 29 |
| <i>United States v. Jannotti</i> , 673 F.2d 578 (3d Cir.), cert. denied, 457 U.S. 1106 (1982) | 21 |
| <i>United States v. Nardello</i> , 393 U.S. 286 (1969) | 22 |
| <i>United States v. O'Grady</i> , 742 F.2d 682 (2d Cir. 1984) | 28, 29, 33 |
| <i>United States v. Spitler</i> , 800 F.2d 1267 (4th Cir. 1986) | 21 |
| <i>United States v. Turley</i> , 352 U.S. 407 (1957) | 24 |
| <i>United States v. Williams</i> , 621 F.2d 123 (5th Cir. 1980), cert. denied, 450 U.S. 919 (1981) | 21 |
| <i>United States v. Young</i> , 470 U.S. 1 (1985) | 34 |

Statutes and rule:

| | |
|--|--------|
| Anti-Racketeering Act of 1934, ch. 569, § 2(b), 48 Stat. 980 | 24 |
| Hobbs Act: | |
| 18 U.S.C. 1951 | 1, 2-3 |
| 18 U.S.C. 1951(b) (2) | 2, 20 |
| 26 U.S.C. 7206(1) | 2, 3 |
| N.Y. Penal Law § 855 (1881) | 25 |
| N.Y. Penal Law § 557 (1909) | 25 |
| Sup. Ct. R. 14.1(a) | 43 |

Miscellaneous:

| | |
|--|----|
| 4 W. Blackstone, <i>Commentaries on the Laws of England</i> (1769) | 23 |
|--|----|

Miscellaneous—Continued:

Page

| | |
|--|--------|
| Comment, <i>Prosecuting Public Officials Under the Hobbs Act: Inducement as an Element of Extortion Under Color of Official Right</i> , 52 U. Chi. L. Rev. 1066 (1985) | 27 |
| Commissioners of the Code, <i>The Penal Code of the State of New York</i> (1864) | 26 |
| 89 Cong. Rec. (1943) : | |
| p. 3227 | 25 |
| p. 3229 | 24 |
| 91 Cong. Rec. (1945) : | |
| p. 11,906 | 25 |
| p. 11,912 | 25 |
| Lindgren, <i>The Elusive Distinction Between Bribery and Extortion: From the Common Law to the Hobbs Act</i> , 35 U.C.L.A. L. Rev. 815 (1988) .. | 23, 26 |
| W. Hawkins, <i>A Treatise of the Pleas of the Crown</i> (6th ed. 1788) | 23 |
| W. LaFave & A. Scott, <i>Criminal Law</i> (1972) | 22, 27 |
| R. Perkins & R. Boyce, <i>Criminal Law</i> (3d ed. 1982) | 22 |
| Ruff, <i>Federal Prosecution of Local Corruption: A Case Study in the Making of Law Enforcement Policy</i> , 65 Geo. L.J. 1171 (1977) | 27 |
| F. Wharton, <i>A Treatise on the Criminal Law</i> (8th ed. 1880) | 23 |

In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 90-6105

JOHN H. EVANS, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (J.A. 32-64) is reported at 910 F.2d 790.

JURISDICTION

The judgment of the court of appeals was entered on September 6, 1990. The petition for a writ of certiorari was filed on October 29, 1990, and was granted on June 3, 1991. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

1. The Hobbs Act, 18 U.S.C. 1951, provides in pertinent part as follows:

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of

any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than \$10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section—

* * * *

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

2. The Internal Revenue Code, 26 U.S.C. 7206, provides in pertinent part as follows:

Any person who—

(1) Declaration under penalties of perjury

Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter;

* * * *

shall be guilty of a felony and, upon conviction thereof, shall be fined not more than \$100,000 * * * or imprisoned not more than 3 years, or both, together with the costs of prosecution.

STATEMENT

After a jury trial in the United States District Court for the Northern District of Georgia, petitioner was convicted of attempted extortion under color of official right, in violation of the Hobbs Act, 18 U.S.C.

1951; and of filing a false personal income tax return, in violation of 26 U.S.C. 7206(1). He was sentenced to 18 months' imprisonment on the Hobbs Act charge and a four-year term of probation on the tax fraud count. The court of appeals affirmed. J.A. 32-53.

1. The Undercover Agent Is Introduced to Petitioner

In 1984, Clifford Cormany, Jr., an undercover FBI agent, began investigating allegations of public corruption in the Atlanta area. He posed as "Steve Hawkins," a representative of a group of real estate investors interested in developing land in DeKalb County, near Atlanta. One of the subjects of the investigation was Albert Johnson, a former Fulton County official. In March 1985, Johnson, acting on his own initiative, arranged for Agent Cormany to meet petitioner, who was an elected member of the DeKalb County Board of Commissioners. 5 Tr. 59-60; 8 Tr. 125. At their initial meeting at a DeKalb County restaurant, Agent Cormany told petitioner that his investment group was attempting to develop land in the Atlanta area and they anticipated that from time to time they would have to come before governmental bodies for the purpose of rezonings, variances, and the like. He asked petitioner whether, if his investment group located land in DeKalb County, they could feel free to call on petitioner for assistance. Johnson added that in the event they did call on petitioner, Cormany's group "would see to it that it would be worth his while." 5 Tr. 36. Petitioner said that he would be willing to help and would assist them if he could. *Ibid.*; see J.A. 32-33.

In August 1985, Johnson invited petitioner to a meeting at Cormany's undercover office in Atlanta. Petitioner attended the meeting, which was videotaped. At the meeting, Cormany told petitioner that

he wanted to give his investment group a "leg up" on other developers in DeKalb County by cultivating a close association with the public bodies that dealt with zoning and related matters. Petitioner agreed to arrange for Cormany and Johnson to meet with other commissioners. J.A. 33. When Johnson suggested the possibility of payoffs for petitioner's help, petitioner assured them that, if he took their money, he would work for it (GX 1T, at 20-21):

Johnson:

Well we, obviously, are speaking to, ah, also John, of uh, of substantial fees. Okay?

Petitioner:

Oh, I understand. I understand.

Johnson:

The, the, uh . . .

Petitioner:

Yeah, but I think the thing's important. See some folks will use the fact they'll just simply make it easy and say, "Well now, I can't convince anybody to do anything." You know, I know when you try. You know, some folk come out and say, "well, you know, I've talked to everybody, and this thing won't fly." Shit, that's easy to do.

Johnson:

Um-hum. Uh-huh.

Petitioner:

I mean, you don't have to do nothing to come back and make that statement. 'Cause ain't nobody gonna talk to you about it, no way.

Johnson:

That's right. (Chuckles).

Petitioner:

You follow what I'm saying. So that's easy to do. I mean that's that, easier than getting up in the morning. I mean, I would be, if, if I was gonna say that I'm gonna help, that means I'm gonna talk to the folk and do what we have to do . . .

Johnson:

That's what we're looking for.

2. The Undercover Agent Seeks Petitioner's Help

In May 1986, Agent Cormany and Johnson contacted petitioner and told him they were interested in a plot of land in DeKalb County and wanted to have it zoned for high density residential use. Johnson said that they "[w]ere willing to do whatever it is we need to do to * * * get it passed." GX 2T, at 16. Referring to the seven-person Board of Commissioners, petitioner responded that "we'll just have to try to parley four votes." *Id.* at 17. Johnson then asked if petitioner could "put a coalition together," whereupon petitioner mentioned that he was up for re-election that year. *Id.* at 24. When Johnson asked what size contribution to petitioner's reelection campaign would be considered "meaningful," petitioner replied that at a recent fundraising event contributors were encouraged to give \$1000 apiece. *Id.* at 27.

Near the end of their discussion, Johnson asked whether petitioner needed any "expense money" for coming to the meeting that morning. GX 2T, at 35-36. Petitioner replied that he had to order a voter registration list and mailing labels in order to do a precinct mailing. He estimated that the registration list would cost him about \$260. Cormany then wrote out a check to petitioner for \$300. Petitioner used

that money to buy the list and sent a thank you note to Cormany. J.A. 34.

Two months later, Agent Cormany and Johnson met with petitioner again at a restaurant and told him that they had obtained a 25-acre tract of land that they wanted to have rezoned for high density development. They told petitioner that inasmuch as they were going forward with a rezoning application, "expense monies would be available in the event they were needed for any purpose." 5 Tr. 87.

3. Petitioner Solicits a Payment From the Undercover Agent and Promises to Assist in the Rezoning Effort

On July 23, 1986, petitioner called Cormany at his undercover residence and asked how Cormany was doing with his rezoning application. When Cormany said he was concerned that he may have filed too close to the deadline, petitioner offered to check on the matter. Cormany then asked if there was any other reason petitioner had called, whereupon petitioner raised the subject of his campaign for re-election to the County Commission. Petitioner said, "I have been running hard and pulling teeth." Cormany responded by saying that he understood what petitioner was saying, but that he was under pressure from his own investors. Petitioner assured Cormany that he was going to do all he could to assist Cormany in his rezoning effort. 5 Tr. 88-91. Cormany and petitioner arranged to meet the following day. J.A. 34-35.

On July 24, petitioner drove to the undercover office in Atlanta to meet with Agent Cormany. In the course of their discussion, which was videotaped, Cormany described his efforts in connection with the rezoning application. He told petitioner that "I'm still a neophyte, ah, and I'm not, ah, politically oriented

by any means but we have a, ah, obviously we have a budget to get these things through." GX 7T, at 23. Cormany subsequently said, "you're ah, absolutely, my, ah, spearhead in this thing," and he added again that "we got, ah, obviously, a generous budget for anything we do." *Id.* at 29-30. At that point, petitioner took out a document that he had brought with him, which contained his campaign budget from June 29 through the date of the primary election on August 12. The document showed \$14,180 in expenses and \$6,295 in contributions, resulting in a shortfall of \$7,885. After Cormany said, "I desperately need[] your help and support on this project," petitioner said (J.A. 35-36):

Well, let me tell you. I, it's cause, see you don't know how I operate. What I'm, what I'm telling you is that, this is what the shortfall is and then you can decide whatever part you want to handle of that.

When Cormany responded, "You're talking about seven eight eighty-five," petitioner responded affirmatively. Cormany then said, "what I'm asking you John, I mean, is if I pick up the entire amount, I mean, does that, would that * * * be a reasonable relationship, a reasonable. . . ." J.A. 36. Petitioner then interrupted and said (J.A. 36-37):

I understand both of us are groping * * * for what we need to say to each other. * * * I'm gonna work. Let me[] tell you I'm gonna work, if you didn't give me but three, on this, I've promised to help you. I'm gonna work to do that. You understand what I mean. * * * If you gave me six, I'll do exactly what I said I was gonna do for you. If you gave me one, I'll do exactly what I said I was gonna do for you.

I wanna' make sure you're clear on that part. So it doesn't really matter. If I promised to help, that's what I'm gonna do.

Petitioner then promised to "[g]ive it the best effort." J.A. 41-42. When Cormany asked whether he could be sure that "at least you'll vote for me," petitioner responded, "You got that. * * * You got that." J.A. 43.

The two men then turned to arranging the mechanics of the payment Cormany was prepared to make. Cormany asked whether his contribution should be in cash or by check. Petitioner first responded that the payment should be in cash, "so there won't be any, any, tinges, or anything." J.A. 37. He then modified that request by asking that \$1000 of the total be paid by check. He explained that he would record and report the \$1000 and "the rest would be in cash." J.A. 38.

Cormany then repeated the terms of the arrangement explicitly, as he understood them, GX T7, at 49-50:

Cormany:

Look, I understand this * * * this arrangement that we have is, is, is primarily for your, your vote and your support.

Petitioner:

Uh-huh. Uh-huh.

Cormany:

. . . in helping me get this thing through.

Petitioner:

Yeah, the only . . .

Cormany:

And I understand that, that, ah, you can't guarantee . . .

Petitioner:

Right.

Cormany:

. . . three or four other votes.

Petitioner:

Well, I, I, I was . . .

Cormany:

As long as I just know that you'll just do what you can and to help me get it through.

Petitioner:

Right. That's right.

Finally, Cormany added, "I hope you understand that, ahh, just because, you're in an election year that's not the only reason that, I mean we would have a budget either way." Petitioner responded, "I understand. Oh, I understand that." J.A. 38.

4. Petitioner Receives \$8000 and Begins to Work on the Rezoning Project

Following the July 24 meeting, Agent Cormany tried to file an application to rezone the property, but the application was rejected because the property had been rezoned less than two years earlier and zoning regulations prohibited any rezoning within that two-year period. Petitioner traveled to Cormany's undercover office again on July 25, where they discussed whether the two-year limitation could be waived. Cormany expressed his desire to have the property zoned for as high a density as possible and said that "through my association with you and, and the help you can give us * * * maybe we'll have a leg up over * * * over an average developer." Petitioner responded, "That's right." GX 10T, at 14; see *id.* at 28-29. He later repeated, "you have a leg up now, no question about that." *Id.* at 31.

Cormany then asked if any "financial consideration" would be necessary for others in connection with the vote on the waiver of the two-year rule. Petitioner replied that he would let Cormany know. GX 10T, at 20, 24. Petitioner then added that the key was one of the other commissioners. He explained, "you see once I get him postured properly then of course we can deal with the other people we need to deal with." *Ibid.* When Cormany said that he had convinced his investors that he had "a leg up over the competition," petitioner replied, "Sure, and I think you're right on that. We just have to * * * keep it on track. That means we have to keep everyone involved all the way down the line." *Id.* at 22. While they were sitting together, petitioner telephoned the Assistant Director of the DeKalb County Planning Department to discuss the two-year rule, and he promised to call several other key figures in the decisionmaking process to persuade them to support Cormany's application. *Id.* at 35-37, 58-59, 76-77.

During the July 25 meeting, Cormany gave petitioner \$7000 in cash, which petitioner placed in an envelope, and a check for \$1000 payable to "John Evans Campaign." Petitioner locked the cash in a file cabinet in his campaign office. Petitioner did not at that time record the \$7000 cash on his books or on the required state campaign financing disclosure form. J.A. 38-39.

Three days later, petitioner spoke with Cormany and promised to give Cormany a "head count" regarding the number of votes he had lined up in support of Cormany's application. GX 13T, at 4. Later that afternoon, petitioner called Cormany; when Cormany returned the call, petitioner told him he had lined

up three of the four votes that would be needed at the August 12, 1986, commissioners' meeting to grant a waiver of the two-year rule. 7 Tr. 57. Several days later, petitioner reported to Agent Cormany that "I think we got the other one now." GX 14T, at 4. Petitioner then arranged restaurant meetings between Agent Cormany and two of the other commissioners at which Agent Cormany argued his case for a waiver. 7 Tr. 57-62. Explaining the purpose of the meetings, petitioner told Cormany, "we're just making sure we got our folk nailed in." GX 15T, at 8. Two days before the meeting, petitioner spoke with Cormany again and relayed that he had a firm commitment from a fourth commissioner to vote in favor of the waiver application. GX 17T, at 1-2.

5. The Rezoning Effort Clears One Hurdle But Encounters Another

At the August 12 DeKalb County Commissioners' meeting, the waiver was granted, with the minimum necessary number of four commissioners voting in favor of the waiver. J.A. 38-39; 7 Tr. 66. Agent Cormany subsequently learned, however, that approval of the zoning application would require an amendment to the County's comprehensive land use plan. When Cormany told petitioner that news, petitioner offered to assist Cormany in obtaining the necessary amendment. GX 20T, at 8; GX 22T, at 6. Cormany asked whether he should "set some money aside" to help get the zoning application approved. Petitioner said that he did not know whether that would be necessary, but that Cormany should "set up a contingency * * * for anything that may come up." *Id.* at 6-7. "If, if things get tight," petitioner added, "we'll just have to deal with it." *Id.* at 8.

6. Petitioner Continues His Efforts in Support of the Rezoning Application, But the Application Is Withdrawn

The Planning Department recommended denial of the application to amend the comprehensive plan, and the Planning Commission denied the rezoning request. Cormany subsequently met with petitioner, who said that he would start working immediately to "garner up four votes" on the County Commission to overturn the Planning Commission's decision. GX 26T, at 12. Petitioner said he would arrange for Cormany to get "keyed into each one of [the Commissioners], and go talk with them. And then I'll do what I got to do." *Id.* at 14; see also *id.* at 27. He added, "we just need to go on and work on the four votes. We got to do that." *Id.* at 18.

Before the County Commissioners' meeting, Cormany withdrew his rezoning application. J.A. 39; 7 Tr. 95-97. When Cormany complained to petitioner that he had not heard back from him after their last conversation, petitioner said, "I never at one time indicated that I would do anything with any other group other than the group that I sit with," GX 28T, at 3, but he added that he had already obtained three votes in support of Cormany's application and was working on the fourth, *id.* at 5.

7. Petitioner Fails to Report the \$7000 Cash Payment as a Campaign Contribution and Denies Having Received the Payment

At the end of petitioner's 1986 campaign, he had a surplus of more than \$7000, counting the \$7000 in cash he received from Agent Cormany. Petitioner testified at trial that during 1986 he used \$4100 of the \$7000 to repay in cash a portion of an old campaign debt to his mother, and used the remaining

\$2900 to repay himself for loans he made to his campaigns from 1982 through 1986. However, he did not record those "repayments" in his books or amend his state disclosure forms until after he knew he was under investigation. On his 1986 income tax return, also filed before he knew he was under investigation, he did not report the \$7000 cash payment as personal income. J.A. 39-40.

In October 1987, two FBI agents interviewed petitioner at his office. Petitioner was informed that the agents wished to ask him about campaign contributions he had received from developers. Petitioner told the agents that Cormany had given him \$1000 and that all of the contributions he received from individuals were reflected in his campaign disclosure reports. Petitioner did not mention the \$7000 in cash that he received from Agent Cormany. J.A. 39.

8. Petitioner Is Convicted of Extortion and Tax Fraud

Petitioner was indicted on one count of attempted extortion in violation of the Hobbs Act by wrongfully obtaining under color of official right both the \$1000 campaign contribution check and the \$7000 cash payment. He also was indicted on one count of filing a false 1986 income tax return by not reporting the \$7000 cash payment as personal income.

In its instructions to the jury, the district court described the elements of extortion under color of official right as follows, J.A. 13:

[T]he defendant can be found guilty of [a Hobbs Act] offense only if all of the following elements are proved beyond a reasonable doubt: First, that the defendant induced the person described in the indictment to part with property or money; Second, that the defendant did so

knowingly and willfully by means of extortion as hereinafter defined; Third, that the extortionate transaction delayed, interrupted or adversely affected interstate commerce.

Now, extortion in a case involving a public official means the wrongful acquisition of property from someone else under color of official right.

Extortion under color o[f] official right is the wrongful taking by a public official of money or property not due him or his office whether or not the taking was accompanied by force, threat or the use of fear. In other words, the wrongful use of otherwise valid official power may convert dutiful actions into extortion.

So, if a public official agrees to take or withhold official action [f]or the wrongful purpose of inducing a victim to part with property, such action would constitute extortion even though the official was already duty-bound to take or withhold the action in question.

The district court also instructed the jury on petitioner's theories of defense, including his claims that "he accepted the money as a campaign contribution," J.A. 10; "his activities were all legitimate activities for a commissioner," J.A. 11; "he never threatened to withhold his support if he did not receive a campaign contribution," J.A. 12; "he would have rendered the same assistance * * * regardless of the size of any campaign contribution or whether he received any campaign contribution at all," *ibid.*; and "he was the victim of entrapment," J.A. 20. With respect to petitioner's campaign-contribution defense, the jury was instructed that it did not violate the Hobbs Act for an elected public official to accept a campaign contribution unless the contribution was induced as a *quid pro quo* for an official act, J.A. 16-17:

The solicitation of campaign contributions from any person is a necessary and permissible form of political activity on the part of persons who seek political office * * *. Thus, the acceptance by an elected official of a campaign contribution does not, in itself, constitute a violation of the Hobbs Act even though the donor has business pending before the official.

However, if a public official demands or accepts money in exchange for [a] specific requested exercise of his or her official power, such a demand or acceptance does constitute a violation of the Hobbs Act regardless of whether the payment is made in the form of a campaign contribution.

The tax fraud count alleged that petitioner knowingly and willfully made a false statement on his income tax return for 1986 by not reporting the \$7000 cash payment he received from Agent Cormany. The jury was instructed on petitioner's theory of defense to that charge as follows: "John Evans contends that the \$7000 was accepted by him as a campaign contribution, and that he was not required to report it on his income tax return. He contends further that the entire amount was used to repay a campaign debt to his mother and to partially repay his own loans to his campaign and district office." J.A. 12. The district court then instructed the jury, J.A. 19, that

if you find that the money the defendant received from Cormany was a campaign contribution and that it was used to pay campaign expenses or debts, the defendant was not required to report it as income on his federal income tax return.

When the court entertained objections to the jury charge, petitioner focused on the instruction that pro-

vided that "[i]f a public official demands or accepts money in exchange for specific requested exercises of his official power, such a demand or acceptance does constitute a violation of the Hobbs Act regardless of whether the payment is made in the form of a campaign contribution." J.A. 26. Petitioner objected to the language "in exchange for specific requested exercises of his official power," explaining that, in his view, "it improperly focuses on the motives of the contributor instead of the intent of the public official." *Ibid.* Petitioner contended that the instruction would have been clearer "if it were stated that the money was accepted with an agreement to perform official action as to—in place of the language 'Requested exercises of official power.'" *Ibid.* Petitioner made no other relevant objections to the jury charge. The district court declined to modify the charge.

The jury convicted petitioner on both the Hobbs Act count and the tax fraud count.

9. Petitioner's Convictions Are Affirmed

The court of appeals affirmed. J.A. 32-64. With respect to the Hobbs Act conviction, the court rejected petitioner's argument that the jury should have been instructed that it had to find that petitioner had initiated the transaction that induced Cormany to part with the money. The court instead held that the "inducement" requirement of the Hobbs Act is satisfied if "a public official has accepted money in return for a requested exercise of official power." J.A. 44. In that circumstance, the court said, "no additional inducement need be shown." *Ibid.*

The court of appeals also rejected petitioner's argument that the instructions failed to require the jury to focus on his state of mind. The court emphasized

that the district court had instructed the jury "that the public official must agree to take official action 'for the *wrongful purpose* of inducing a victim to part with property,'" and "that the defendant induced the person * * * to part with property * * * knowingly and willfully by means of extortion." J.A. 47-48.

Petitioner raised no relevant challenge to his tax fraud conviction in the court of appeals. See Pet. i n.1.

SUMMARY OF ARGUMENT

I. Most courts of appeals, including the court below, have held that the Hobbs Act prohibition against extortion "under color of official right" tracks the common law crime of official extortion and requires only that the public official accept an unauthorized payment, knowing that the payment was made in return for his official acts. Two courts of appeals have adopted a narrower construction of the offense, imposing a requirement that the public official induce the payment in some manner. We believe that the majority position is correct, and that nothing in the language, legislative history, or common law background of the Hobbs Act supports the imposition of an "inducement" requirement as an element of extortion under color of official right. In any event, however, the jury instructions in this case were consistent with the narrower construction of the statute. Therefore, regardless of whether the Court agrees with the construction of the statute adopted by the court of appeals, or whether it agrees with the narrower, minority position, petitioner's conviction must be upheld.

Consistent with the minority position, the jury was instructed that, in order to convict petitioner of extortion under color of official right, it had to find

that he induced the \$8000 payment. Although petitioner claims that no inducement instruction was given, the district court told the jury that one of the elements of the offense is "that the defendant induced the person described in the indictment to part with property or money." J.A. 13. The jury was further told that a public official may induce a payment by agreeing to exchange an exercise of official power for a payment: "if a public official agrees to take or withhold official action [f]or the wrongful purpose of inducing a victim to part with property, such action would constitute extortion." *Ibid.* Thus, contrary to petitioner's assertions, the court's instructions did not allow the jury to convict petitioner of extortion on the basis of merely passive acceptance of a payment.

Petitioner argues that the instructions were unclear as to whether the jury was to focus on petitioner's state of mind or Agent Cormany's. Yet even the instruction on which petitioner bases his challenge clearly focused on petitioner's state of mind: it provided that "if a public official demands or accepts money in exchange for [a] specific requested exercise of his or her official power," the official has committed extortion under color of official right. J.A. 17. And the instructions as a whole directed the jury to focus on petitioner's state of mind, since the district court advised the jury that what mattered was whether petitioner wrongfully agreed to exchange his official acts for payment.

The evidence supports the jury's verdict. After petitioner was told that "substantial fees" would be available in return for his assistance, he agreed to "talk to the folk and do what we have to do." GX 1T, at 20-21. During his campaign, he presented his projected \$7885 deficit to Agent Cormany, told him

that this is "how I operate," and said that "you can decide whatever part you want to handle." J.A. 36. When Agent Cormany proposed an \$8000 payment, petitioner noted that "both of us are groping * * * for what to say to each other" and took the lead in deciding how the payment should be structured. Petitioner made it clear that the \$7000 cash portion of the payment would not be listed on any records "so there won't be any, any, tinges, or anything." *Ibid.* Thus, the evidence showed that petitioner corruptly induced the payment.

II. Petitioner's tax fraud conviction should also be upheld. There is no merit to his claim that (1) the jury may have been confused as to what constitutes a campaign contribution, and (2) the jury may have focused on whether Agent Cormany, rather than petitioner, believed the \$7000 cash payment was a campaign contribution. The instructions accurately defined a campaign contribution, and they emphasized that the government had to prove that the person filing the tax return knew it was false. Moreover, the jury could properly conclude that the \$7000 was not a campaign contribution: the \$1000 check was payable to petitioner's campaign, but the \$7000 in cash was not recorded, was not reported, was not used to pay current campaign expenses, and was available to be used as petitioner chose. Petitioner argued to the jury that even though he did not enter the \$7000 cash payment on his campaign records until after he learned that he was under investigation, he received the money as a campaign contribution and subsequently used it to pay old campaign debts. In light of the circumstances in which that payment was accepted, it is not surprising that the jury did not find petitioner's story credible.

ARGUMENT

I. PETITIONER WAS PROPERLY CONVICTED OF EXTORTION UNDER COLOR OF OFFICIAL RIGHT

Petitioner claims that “the district court erroneously charged the jury on extortion under color of official right by not requiring inducement,” and that as a result it “authoriz[ed] a conviction based on passive acceptance of a contribution.” Br. 24. He further contends that the court’s charge on the Hobbs Act count “ignored the *mens rea* required of the defendant, focusing instead on the actions of the payor, an undercover agent.” *Ibid.* Examination of the jury charge, however, shows that the charge specifically required the government to prove that petitioner induced the payment from Agent Cormany, and that the jury’s attention was properly focused on petitioner’s state of mind. Finally, contrary to petitioner’s claims, the evidence supports the jury’s verdict on the Hobbs Act count, regardless of whether the payment to petitioner is regarded as a bona fide campaign contribution or as a personal payoff disguised as a contribution.

A. The Jury Was Instructed That The Government Had To Prove That Petitioner Intentionally And Wrongfully Induced The Payment

1. The Majority Rule: Extortion Under Color of Official Right Does Not Require Proof That the Public Official Induced the Payment

“Extortion” is defined, for purposes of the Hobbs Act, as “the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.” 18 U.S.C. 1951(b)(2). The scope of that definition, and in particular the “color of of-

ficial right” portion of the definition, has been the subject of judicial and academic debate for the past 20 years. See *McCormick v. United States*, 111 S. Ct. 1807, 1813 n.5 (1991); *id.* at 1819 (Scalia, J., concurring). Most courts of appeals have adopted the view that extortion under color of official right is not a subspecies of coercive extortion, but a separate offense, in which property is obtained not because of threats or fear, but because of the public official’s office. Under this view, a public official commits a violation if he accepts a payment that is not due him, knowing that the payment was made in return for his official acts; it is not necessary for the public official to take any action to induce the payment, such as a demand, a threat, or a promise.¹

We submit that the majority view is correct. The language of the statute divides the crime of extortion into two parts: coercive extortion (“the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear”) and official extortion (“the obtaining of property from another * * * under color of official

¹ Nine circuits, including the court below, subscribe to the majority view. See *United States v. Garner*, 837 F.2d 1404, 1423 (7th Cir. 1987), cert. denied, 486 U.S. 1035 (1988); *United States v. Spitler*, 800 F.2d 1267, 1274-1275 (4th Cir. 1986); *United States v. Jannotti*, 673 F.2d 578, 594-596 (3d Cir.) (en banc), cert. denied, 457 U.S. 1106 (1982); *United States v. French*, 628 F.2d 1069, 1074 (8th Cir.), cert. denied, 449 U.S. 956 (1980); *United States v. Williams*, 621 F.2d 123, 123-124 (5th Cir. 1980), cert. denied, 450 U.S. 919 (1981); *United States v. Butler*, 618 F.2d 411, 417-418 (6th Cir.), cert. denied, 447 U.S. 927 (1980); *United States v. Hall*, 536 F.2d 313, 320-321 (10th Cir.), cert. denied, 429 U.S. 919 (1976); *United States v. Hathaway*, 534 F.2d 386, 393-394 (1st Cir.), cert. denied, 429 U.S. 819 (1976).

right"). If the statute is parsed in that fashion, the element of inducement applies only to the offense of coercive extortion, and not to the offense of official extortion. Some courts have read the phrase "under color of official right" to modify the word "induced" rather than the word "obtaining," and thereby to import a requirement of inducement into the official extortion portion of the definition. See *United States v. Aguon*, 851 F.2d 1150, 1162-1163 (9th Cir. 1988) (en banc). That interpretation of the language seems strained. If the drafters had intended the inducement requirement to apply to official extortion, it would have been more natural to add the "official right" language to the prepositional phrase "by wrongful use of actual or threatened force, violence, or fear." What is even more telling is that, as we indicate below, the common law formulations from which the Hobbs Act definition was drawn refer to official extortion simply as the obtaining of property under color of official right or under color of office, not the obtaining of property from another, with his consent, induced under color of official right.

At common law "official extortion" was a separate offense from the types of coercive property crimes that were later added by statute and generally grouped in penal codes under the rubric of "extortion." See *United States v. Nardello*, 393 U.S. 286, 289 (1969). Official extortion was the acceptance by a public official of an unauthorized payment or fee for the performance of his official duties. See R. Perkins & R. Boyce, *Criminal Law* 442-443 (3d ed. 1982); W. LaFare & A. Scott, *Criminal Law* 704 (1972); *United States v. Dozier*, 672 F.2d 531, 539 (5th Cir.), cert. denied, 459 U.S. 943 (1982). It was an offense to accept the fee; neither a demand nor any other

inducement on the part of the public official was required. See Lindgren, *The Elusive Distinction Between Bribery and Extortion: From the Common Law to the Hobbs Act*, 35 U.C.L.A. L. Rev. 815, 882-889 (1988).²

The "color of official right" language found in the Hobbs Act closely parallels the language used in common law formulations of the offense of official extortion. See 4 W. Blackstone, *Commentaries on the Laws of England* 141 (1769) (extortion "is an abuse of public justice, which consists in an officer's unlawfully taking, by colour of his office, from any man, any money or thing of value, that is not due him, or more than is due, or before it is due"); W. Hawkins, *A Treatise of the Pleas of the Crown* 316 (6th ed. 1788) ("extortion in a large sense signifies any oppression under colour of right; but that in a strict sense, it signifies the taking of money by any officer, by colour of his office, either where none at all is due, or not so much is due, or where it is not yet due."); F. Wharton, *A Treatise on the Criminal Law* § 1574 n.2 (8th ed. 1880) ("Extortion, in its general sense, signifies any oppression by color of right; but technically it may be defined to be the taking of money by an officer, by reason of his office, either where none is due, or where none is yet due."); *People v. Whaley*, 6 Cow. 661, 663-664 (N.Y. Sup. Ct. 1827) (same).

² In his opinion for the panel in *United States v. Aguon*, 813 F.2d 1413, 1416-1417 (9th Cir. 1987), Judge Noonan took the position that at common law, at least in the United States, the term "color of official right" has always been construed to mean that the official made a demand. In a detailed study of the common law background of the crime of official extortion, Professor Lindgren convincingly rebuts Judge Noonan's historical analysis. See Lindgren, *supra*, 35 U.C.L.A. L. Rev. at 837-909.

It is ordinarily presumed that a term used in a statutory offense is intended to have the same meaning that it had in the corresponding common law crime. See *Taylor v. United States*, 110 S. Ct. 2143, 2155 (1990); *United States v. Turley*, 352 U.S. 407, 411 (1957); *Morissette v. United States*, 342 U.S. 246, 263 (1952) ("where Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, * * * absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them"). Nothing in the text or the legislative history of the Hobbs Act indicates a congressional purpose to depart from the common law definition of official extortion. To the contrary, the definitions of extortion adopted in both the Hobbs Act in 1946 and its predecessor, the Anti-Racketeering Act of 1934, ch. 569, § 2(b), 48 Stat. 980, appear to adopt the settled common law concepts of both coercive and official extortion.

The legislative history is not dispositive with respect to the meaning of the phrase "under color of official right," but it provides some support for the majority view. Other than a confusing exchange in which the sponsors gave a clearly incorrect explanation of the phrase,³ the sponsors did not propose a

³ In the course of debate over a proposal to omit the "under color of official right" language, Representatives Hobbs and Sumners said that the phrase referred to persons who were not public officials, but obtained money by claiming to be public officials. See 89 Cong. Rec. 3229 (1943) (statement of Rep. Hobbs); *ibid.* (statement of Rep. Sumners). That interpretation of the phrase cannot possibly be right. It is not dictated by the language of the provision, and it has no pedigree in any common law or statutory source. If there is one universally accepted feature of the crime of extortion

definition or expand upon the statutory language. They explained only that the terms robbery and extortion "have been construed a thousand times by the courts," 91 Cong. Rec. 11,912 (1945) (statement of Rep. Hobbs), and that the definitions of those terms were "based on the New York law," 89 Cong. Rec. 3227 (1943) (statement of Rep. Hobbs); see 91 Cong. Rec. 11,906 (1945) (statement of Rep. Robison); see *United States v. Enmons*, 410 U.S. 396, 406 n.16 (1973).

At the time the Hobbs Act was enacted, New York law carried forward the common law offense of official extortion. As early as 1881, the New York Penal Code contained a statute reaching "extortion committed under color of official right." The statute provided that any public officer who asks, receives, or agrees to receive fees or other compensation for his official service in excess of the amount allowed by statute commits extortion. N.Y. Penal Law § 855 (1881). Although the caption of the statute was changed in 1909, see N.Y. Penal Law § 557 (1909), the text remained essentially the same: it continued to reflect the broad common law prohibition against acceptance of unauthorized fees, penalizing not only requests for improper fees or compensation for official

under color of official right, it is that it applies to public officials.

In his concurring opinion in *McCormick*, 111 S. Ct. at 1819-1820, Justice Scalia proposed a related, but more plausible, construction of the term "under color of official right," treating the language as creating a type of false pretenses offense. But that theory is narrower than the common law formulation; given the clear common law basis of the Hobbs Act definition of extortion, it does not seem likely that Congress intended such a narrow construction of the term.

services, but also the receipt of such fees or compensation. See Lindgren, *supra*, 35 U.C.L.A. L. Rev. at 898-899.

The language in the Hobbs Act can be traced to the definition of extortion in the Field Code, a well-known 19th century model penal code, which formed the basis for the revision of the New York Penal Code. See Commissioners of the Code, *The Penal Code of the State of New York* tit. XV, ch. VI, § 613, at 220-222 (1864). The pertinent portions of the Field Code were enacted in New York and in a number of other jurisdictions as well. The Field Code's definition of extortion is almost word-for-word the same as that found in the Hobbs Act. And the Field Code in turn adopted the definition from the language that was used by common law courts and commentators to describe the common law crime of official extortion, i.e., a public official's receipt of payments, made for the performance of official acts, to which the official was not entitled. See *United States v. Aguon*, 851 F.2d at 1180 (Wallace, J., dissenting); Lindgren, *supra*, 35 U.C.L.A. L. Rev. at 889-905.

In sum, the legislative history and background of the "under color of official right" branch of the Hobbs Act indicates that Congress intended no departure from the common law concept of official extortion, as it was expressed in the Field Code and subsequent New York Penal Code provisions. For that reason, we submit that the majority of circuits, including the court below, are correct in holding that in order to establish extortion under color of official right under the Hobbs Act, the government need only show that a public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts.

Arguments that have been made against this position do not withstand close scrutiny. First, resistance to the broad construction of the phrase "under color of official right" seems to come in part from the lay image of extortion as requiring some threat of injury. As we have noted, however, the common law crime of official extortion carried no such connotation and had no such requirement; that requirement therefore should not lightly be imported into the Hobbs Act, particularly in view of the Act's use of language taken directly from the common law formulation.

Second, at least one commentator has argued that the term "obtaining" in the statutory phrase "obtaining property under color of official right" is inconsistent with passive acceptance. See Comment, *Prosecuting Public Officials Under the Hobbs Act: Inducement as an Element of Extortion Under Color of Official Right*, 52 U. Chi. L. Rev. 1066, 1078-1079 (1985). The term "obtaining," however, like the closely related term "taking," is simply a way of expressing the traditional common law requirement that the defendant exercise dominion over property in order to complete certain kinds of property offenses, see W. LaFare & A. Scott, *supra*, at 631; it does not carry the connotation of active pursuit.

Finally, a desire to give a narrow construction to the "color of official right" branch of the Hobbs Act appears to derive at least in part from judicial concerns over the expansiveness of the statute if not so limited, and its potential for federalizing many forms of local corruption. See Ruff, *Federal Prosecution of Local Corruption: A Case Study in the Making of Law Enforcement Policy*, 65 Geo. L.J. 1171 (1977). Congress legislated broadly in the Hobbs Act, however, and this Court has appropriately refused to

fashion artificial limitations on its breadth. For example, in *United States v. Culbert*, 435 U.S. 371 (1978), the Court construed the Hobbs Act robbery provision to apply to any robbery that has a minimal effect on interstate commerce. The Court adopted that construction of the statute even though the effect of that construction has the potential to bring a large number of ordinary robberies within federal jurisdiction.

2. The Minority Position: Extortion Under Color of Official Right Requires "Inducement" by the Public Official

Focusing on the use of the term "induced" in the definition of extortion, two courts of appeals have held that a public official may not be convicted of extortion under color of official right unless he acted to induce the making of the payment that forms the basis for his conviction. In *United States v. O'Grady*, 742 F.2d 682, 687-689 (1984) (en banc), the Second Circuit asked "whether extortion under color of official right occurs when a public official merely accepts unsolicited benefits knowing that they were given because of his public office," 742 F.2d at 684, and held that it does not. In *United States v. Aguon*, 851 F.2d 1158 (1988) (en banc), the Ninth Circuit found error in a jury instruction that stated that extortion under color of official right "does not require proof of any specific acts on the part of the public official demonstrating * * * inducement." 851 F.2d at 1161.

This construction of the statute is flawed because, as we have argued above, the term "induced" in the statute applies only to the portion of the definition that refers to coercive extortion, not to the portion

that refers to official coercion. But even if the term "induced" applies to the "under color of official right" branch of the extortion definition, the language still does not support the minority construction of the statute. What is "induced" is the consent of the victim to part with property, and the victim's consent can be "induced" by the public official's office even absent any act of inducement on the part of the public official himself.

While the courts and commentators have debated the merits of the competing positions at length, Judge Posner has accurately observed that "[t]here is an air of the academic about this intercircuit conflict because, as a matter of fact, in none of the cases in which the issue has been presented was the official passive." *United States v. Holzer*, 816 F.2d 304, 311 (7th Cir.), vacated, 484 U.S. 807 (1987), aff'd in part on remand, 840 F.2d 1343 (7th Cir.), cert. denied, 486 U.S. 1035 (1988); accord *United States v. O'Grady*, 742 F.2d at 689-690 (discussing 25 leading "official right" extortion cases, all of which "establish conduct from which inducement can readily be inferred").

It is not likely that the difference between the majority and minority views will produce a different outcome in many cases, because as the Second Circuit observed in *O'Grady*, "[p]roof of a request, demand or solicitation, no matter how subtle, will establish wrongful use of public office; proof of a *quid pro quo* would suffice as would other circumstantial evidence tending to show that the public official induced the benefits." 752 F.2d at 691-692. In the case before it, the court added, if the defendant "created the impression, not by words but by deeds, that vendors whose business fortunes with the [New York City Transit Authority] depended on him were expected

to make generous 'gifts' to him, then [the defendant] could not escape conviction." *Id.* at 692. The Ninth Circuit similarly held in *Aguon* that "'inducement' can be in the overt form of a 'demand,' or in a more subtle form such as 'custom' or 'expectation' such as might have been communicated by the nature of defendant's prior conduct in office." 851 F.2d at 1166.⁴ It is a rare case in which a public official who is receiving an illicit payoff does nothing at all to induce the payoff. While the official may not initiate the transaction that leads to the payoff, the official almost invariably takes some steps to encourage the making of the payment that he intends to accept, although those steps may be subtle and, in settings in which corruption is commonplace, the official's action may amount to little more than reliance on a well-established understanding that payoffs are required to obtain official assistance.⁵

⁴ Subsequent decisions of the Second and Ninth Circuits make clear that *Aguon* and *O'Grady* hold only that a Hobbs Act conviction may not be "based on mere acceptance of a contribution." *United States v. Egan*, 860 F.2d 904, 907 (9th Cir. 1988). In *Egan*, the Ninth Circuit affirmed a Hobbs Act conviction because the instructions provided that the defendant could be convicted only if the jury found that he had communicated that favors were for sale. In *United States v. Campo*, 774 F.2d 566, 568-569 (1985), the Second Circuit noted that a majority of the court had concluded in *O'Grady* "that 'the jury should be permitted to infer inducement by the defendant based upon a finding of repeated acceptances over a period of time of substantial benefits.'" The court in *Campo* affirmed the Hobbs Act conviction of a police officer who repeatedly accepted \$50 from the operator of a business in return for patrolling the area around the business, although the police officer had not requested the payoffs. 774 F.2d at 568.

⁵ While it is an open question how the "under color of official right" branch of the Hobbs Act should apply gen-

3. *The Instructions In This Case Were Consistent With the Minority View That Petitioner Advocates*

While the court of appeals adopted the broader, majority view of the scope of the Hobbs Act, the instructions given by the district court were entirely consistent with the narrower, minority position. Accordingly, regardless of how this Court resolves the conflict among the circuits as to the proper scope of the "under color of official right" branch of the Hobbs Act, petitioner's Hobbs Act conviction must be upheld.

The court's charge informed the jury that the government had to prove the \$8000 payment was induced by petitioner. Nothing could be plainer to that effect than the instruction setting out the elements of a Hobbs Act violation. It began: "[T]he defendant can be found guilty of [a Hobbs Act] offense only if all

erally to payments to public officials, this Court has already resolved the issue with respect to a subset of such cases—those in which the payments consist of campaign contributions made to elected officials. Last Term, in *McCormick v. United States*, 111 S. Ct. 1807 (1991), the Court held that with respect to campaign contributions, a violation of the Hobbs Act is made out only if the official agrees to perform some official service in return for the payment. 111 S. Ct. at 1816. The Court noted that the solicitation and receipt of voluntary contributions is such a widespread and accepted means of campaign financing that the Hobbs Act should not be construed to apply to an elected or campaigning politician receiving funds from a contributor who hopes that the candidate, if elected, will act in a way that the contributor applauds. As we indicate below, the district court gave proper instructions to the jury regarding the applicable legal standard if the jury found the payments to petitioner to constitute a campaign contribution, although the jury's verdict on the tax fraud count, following proper instructions, indicates that it did not find the \$7000 cash payment to be a campaign contribution.

of the following elements are proved beyond a reasonable doubt: First, that *the defendant induced* the person described in the indictment to part with property or money." J.A. 13 (emphasis added).

In defining "extortion under color of official right," the district court underscored the need for the government to prove that petitioner induced the payment. The court explained that the crime consists of "the wrongful taking by a public officer of money or property not due him or his office," *i.e.*, "the wrongful use of otherwise valid official power." J.A. 13. Accordingly, the court instructed, "if a public official agrees to take or withhold official action [f]or the *wrongful purpose of inducing* a victim to part with property, such action would constitute extortion." *Ibid.* (emphasis added).

Although petitioner alleges that the instructions allowed the jury to convict on the basis of the "passive acceptance of a contribution," Br. 24, the focus of his argument is actually on the claim that the instructions did not require the jury to find that he *initiated* the transaction. In addition, he makes the related claim that the instructions did not require the jury to find "an element of duress such as a demand." Br. 22.

Petitioner alleges that Agent Cormany was "the aggressor" who made "repeated calls to initiate meetings." Br. 40. But even if the Hobbs Act requires proof of acts of "inducement," as the Second and Ninth Circuits have held (and as the district court's instructions provided), no court holds that it requires proof of "initiation." Nothing in the text or background of the statute would support such a requirement, which would immunize some of the most aggravated forms of public corruption from prosecution

under the Hobbs Act as long as the official was careful not to be the one to broach the subject of payoffs.

In connection with his claim that the Hobbs Act requires proof that the public official initiated the exchange and subjected his victim to duress, petitioner argues that "[t]he evidence at trial against [petitioner] is more conducive to a charge of bribery than one of extortion." Br. 40. While the evidence in this case may also have supported a charge of bribery, it is not a defense to a charge of extortion under color of official right that the defendant could also have been convicted of bribery. Even those courts that have adopted an inducement requirement for extortion under color of official right do not require proof that the inducement took the form of threats or demands. *United States v. O'Grady*, 742 F.2d at 687; *United States v. Aguon*, 851 F.2d at 1166. Thus, if a public official accepts or (under the minority view) induces a payment in return for an agreement to exercise official power, he is guilty of extortion under color of official right, even though he may also be guilty of soliciting a bribe. See *United States v. Aguon*, 851 F.2d at 1167.⁶

⁶ Occasionally, courts dealing with extortion by force or fear have stated that such extortion and bribery are mutually exclusive. See *e.g.*, *People v. Feld*, 262 A.D. 909, 28 N.Y.S.2d 796, 797 (Sup. Ct. 1941); see also *People v. Dioguardi*, 8 N.Y.2d 260, 273-274, 168 N.E.2d 683, 203 N.Y.S.2d 870 (1960). That may be a correct observation where the allegation is that the victim was intimidated into making a payment (extortion by force or fear) and did not offer it voluntarily (bribery). But such cases do not stand for the proposition that extortion under color of official right and bribery are mutually exclusive offenses either under the common law or the Hobbs Act.

The court of appeals, J.A. 43, accepted petitioner's contention that the district court's instructions "permitted the

In sum, the instructions given by the district court imposed on the government the burden of showing that petitioner induced the payment that was the subject of the prosecution. Because the "inducement" requirement is embraced by only two circuits—not including the circuit in which petitioner was tried—the instructions were thus quite favorable to petitioner. Perhaps for that reason, petitioner did not object to the instructions on the ground that they failed adequately to set forth the requirement of inducement. Because of petitioner's failure to object on that ground, petitioner's challenge to the "inducement" instructions must be reviewed under the plain error standard. We submit that even if the district court's instructions on inducement could have been more elaborate, any inadequacy in those instructions was certainly not so "egregious" that a "miscarriage of justice" resulted, justifying a finding of plain error. See *United States v. Young*, 470 U.S. 1, 15 (1985).

B. The Jury Was Correctly Instructed On The Standard Applicable To Campaign Contributions

In *McCormick v. United States*, 111 S. Ct. at 1816, this Court held that the receipt of campaign contributions is vulnerable under the Hobbs Act "only if the payments are made in return for an explicit promise or undertaking by the official to perform or not to perform an official act." Although this case was

jury to convict [petitioner] without finding that he conditioned the performance of an official act upon payment of money," *i.e.*, the jury did not have to find that petitioner threatened not to take action unless a payment was made. But, as we have noted, no court of appeals regards inducement as requiring proof of a threat or demand.

tried before *McCormick* was decided, the district court's instruction on the campaign contribution issue conformed remarkably closely to the test that this Court subsequently adopted in *McCormick*. The district court instructed as follows (J.A. 17):

[T]he acceptance by an elected official of a campaign contribution does not, in itself, constitute a violation of the Hobbs Act even though the donor has business pending before the official.

However, if a public official demands or accepts money in exchange for [a] specific requested exercise of his or her official power, such a demand or acceptance does constitute a violation of the Hobbs Act regardless of whether the payment is made in the form of a campaign contribution.

Petitioner argues (Br. 46-47) that this instruction did not properly describe the *quid pro quo* requirement for conviction if the jury found that the payment was a campaign contribution. He argues that "there is no *quid pro quo* until and unless [the public official complies or attempts to comply with the request since no action at all has been required of the defendant." Br. 47. Petitioner did not raise this objection to the instruction either in the district court or in the court of appeals. In any event, the argument is wholly without merit. In circumstances where a campaign contribution is extorted under color of official right, the offense is completed at the time the public official receives a payment in return for his agreement to perform specific official acts. Fulfillment of the *quid pro quo* is not an element of the offense. Indeed, it is not an element of the offense that the public official even intended to fulfill the *quid pro quo*, as long as he obtains a payment by com-

municating an intention to exchange his services for money.⁷

Relying on *United States v. Dozier*, 672 F.2d 531 (5th Cir), cert. denied, 459 U.S. 943 (1982), petitioner further contends (Br. 46) that the "campaign contribution" instruction was inadequate because the Hobbs Act is not aimed at "every elected official who solicits a monetary contribution that represents the donor's vague expectation of future benefits," but instead "penalize[s] those who, under the guise of requesting 'donations,' demand money in return for some act of official grace." 672 F.2d at 537. But the instruction at issue in this case is entirely consistent with the Fifth Circuit's analysis in *United States v. Dozier*. The instruction emphasized that the mere acceptance of campaign contributions does not constitute a violation of the Hobbs Act, "even though the donor has business pending before the official"; it made clear that a campaign contribution can give rise to criminal liability only if the public official receives the funds in return for an official act, i.e., "in exchange for [a] specific requested exercise of his or her official power." J.A. 17.

C. The Jury Was Properly Instructed To Focus On Petitioner's Actions And Intentions

The only pertinent objection that petitioner made to the jury instructions at trial was that the campaign contribution instruction "improperly focuse[d] on

⁷ Petitioner's argument seems in part to be based on a misinterpretation of the term "requested" as used in the instruction. The instruction does not say that the public official must have accepted a payment "in exchange for a specific request of him," as petitioner argues (Br. 47); it says that the public official must have accepted a payment in exchange for a "specific requested exercise of official power," i.e., an exercise of official power that the party making the payment has requested.

the motives of the contributor [Agent Cormany] instead of on the intent of the public official [petitioner]." J.A. 26. Petitioner renews that claim here, arguing that the campaign contribution instruction "place[d] the focus on the actions of the agent rather than the intent of the public official." Br. 45. That characterization of the charge is wrong both with respect to the specific instruction that petitioner challenged and with respect to the instructions as a whole.

First, contrary to petitioner's assertion, the district court did not state that a violation of the Hobbs Act may be based on the acts and intentions of the person who makes the payment. The very instruction on which petitioner focuses states that a violation may be shown only "if a public official demands or accepts money in exchange for [a] specific requested exercise of his or her official power." J.A. 17. Even read in isolation, that instruction did not tell the jury to focus on Agent Cormany's intentions. Rather, the instruction described a situation where a public official "accepts money in exchange for" a specific requested exercise of his official power. The quoted phrase thus includes a requirement that an understanding was reached between petitioner and Cormany, and it specifically directs attention to *petitioner's* side of the transaction.

Other instructions also made clear to the jury that it was to focus on petitioner's state of mind, not Cormany's. The district court instructed the jury that "extortion in a case involving a public official means the wrongful acquisition of property from someone else * * * [,] the wrongful taking by a public official of money or property not due him * * * [,] the wrongful use of otherwise valid official power * * * [, and] agree[ing] to take or withhold official action

[f]or the wrongful purpose of inducing a victim to part with property." J.A. 13. In addition, the jury was instructed that the government was required to prove that petitioner "induced" a payment "knowingly and willfully by means of extortion." *Ibid.* The jury was further charged that "the word 'willfully' * * * means that the act was committed voluntarily and purposely with the specific intent to do something the law forbids; that is, with bad purpose either to disobey or disregard the law," and that "the word 'knowingly' * * * means that the act * * * was [done] voluntarily and intentionally and not because of mistakes or accident." J.A. 19. These instructions all focus unambiguously on the actions and intentions of petitioner and refute petitioner's claim that "the district court's instruction places the focus on the actions of the agent rather than the intent of the public official." Br. 45.

Finally, the instructions were particularly directed at the actions and intentions of petitioner because this was an "attempt" case. There was no "victim" of extortion in this case because Agent Cormany worked for the FBI. Accordingly, the indictment charged petitioner with attempted extortion in violation of the Hobbs Act. The district court's explanation of the crime of attempt specifically focused the jury's attention on petitioner's conduct and mental state, since the court charged the jury that "[t]o attempt an offense means intentionally to do some act in an effort to bring about or accomplish something the law forbids to be done," and it was petitioner (not Agent Cormany) who was charged with attempted extortion. J.A. 14.⁸

⁸ The court of appeals said that the instructions did not express the requirement that "the public official *knew* that the

D. The Evidence Supports The Jury's Conclusion That Petitioner Wrongfully Induced The Payment By Agreeing To Exercise Official Power In Return For The Payment

The evidence in this case was sufficient to prove that petitioner, by his affirmative conduct, wrongfully induced a payment from Agent Cormany in return for the exercise of his official power. Petitioner (Br. 2-19) argues his contrary interpretation of the facts to this Court, as he did to the jury. But even without the assistance of the familiar rule that the evidence in support of a jury verdict must be viewed in the light most favorable to the government, *Jackson v. Virginia*, 443 U.S. 307, 326 (1979), the facts we have summarized above clearly show a public official selling specific services for a price and then performing on his undertaking. While petitioner displayed

payment he received was motivated by a hope of influence * * * as clearly as it might have." J.A. 47. The court suggested that the instructions would have been clearer if they had stated that the jury "could only convict '[i]f the public official knows the motivation of the victim focused on the public official's office.'" J.A. 47 n.7. But the instructions in this case were far more specific than the version the court of appeals suggested. Rather than merely requiring the jury to conclude that petitioner knew that Agent Cormany's motivation "focused on" petitioner's office, the charge in this case (1) required the jury to find that petitioner "induced" the payment, J.A. 13; (2) gave as an example of extortion "under color of official right" a situation where "a public official agrees to take or withhold official action [f]or the wrongful purpose of inducing a victim to part with money," *ibid.*; and (3) explained with respect to petitioner's campaign contribution defense that a public official commits extortion with respect to a campaign contribution only if he "demands or accepts money in exchange for [a] specific requested exercise of his or her official power," J.A. 17.

caution and even occasional coyness in his relationship with Cormany, a fair reading of the facts makes it clear that petitioner sought a payment from Cormany knowing that Cormany needed his assistance in connection with the rezoning application, and that he went to exceptional lengths to support the application after the money was paid.

Petitioner claims that he "never indicated that Cormany was required to make any campaign contribution nor did he place any conditions on his help." Br. 14. But at one of the initial meetings, on August 14, 1985, when Johnson suggested that Cormany's group would offer petitioner "substantial fees," petitioner responded, "Oh, I understand. I understand." Petitioner then assured Cormany and Johnson that, while others might take their money and do nothing for it, "if I was gonna say that I'm gonna help, that means I'm gonna talk to the folk and do what we have to do." GX 1T, at 20-21.

Petitioner communicated that a payment was required by bringing his campaign finance records to Cormany's office on July 24, 1986, and presenting them after Cormany described his need for assistance. The jury was entitled to infer from petitioner's raising the subject of his campaign, both at that meeting and at the earlier meeting in May, that he meant to convey that Cormany should make some substantial payment in exchange for petitioner's support of his development project. Petitioner said: "[W]hat I'm telling you is that, this is what the shortfall is and then you can decide whatever part you want to handle of that. * * * [I]f you didn't give me but three [thousand], on this, I've promised to help you. * * * If you gave me six [thousand], I'll do exactly what I said I was gonna do for you.

If you gave me one [thousand], I'll do exactly what I said I was gonna do for you." J.A. 36-37. While petitioner was careful to say he would work for Cormany whether Cormany gave him \$1000, \$3000, or \$6000, he did not tell Cormany that he would exert himself if no substantial payment was made.

In determining whether petitioner was attempting to solicit a corrupt payment, the jury was entitled to take note of the obviously sinister connotation of such statements by petitioner as "you don't know how I operate," "I understand both of us are groping * * * for what we need to say to each other," and that part of the payment should be in cash "so there won't be any, any, tinges, or anything." J.A. 36-37. The jury was also justified in inferring petitioner's wrongful intentions from petitioner's acknowledgement of understanding in response to Cormany's statement that he would be willing to make a payment to petitioner even if he was not campaigning. J.A. 38.

It was significant that petitioner took the initiative in suggesting how the payment should be divided, with \$7000 being paid in cash and \$1000 by check, and only the latter to be reported as a campaign contribution. J.A. 37. The jury also could infer that petitioner's denial to FBI agents that he had received any cash contribution from Agent Cormany reflected his consciousness that the payment was a wrongful payoff when he received it. Finally, the jury could properly conclude from petitioner's assiduous efforts on Cormany's behalf and his active participation as an internal lobbyist for Cormany's rezoning effort, that petitioner regarded the \$8000 payment as a fee for services to Cormany's organization.

In this case, the evidence consisted primarily of video and audio recordings, which enabled the jury

to witness the crime as it was committed. The jury was thus in a position to assess the inflections, pauses, and other emphases given to the spoken words by petitioner in order to convey his meaning and intentions. Moreover, for six days of trial, petitioner testified extensively in support of his various theories of defense, and he was subject to extensive cross-examination. The jury had every opportunity to assess petitioner's explanations and his credibility. Evidently, the jury disbelieved petitioner when he sought to explain his conduct as innocent. There is no reason for this Court to disturb the jury's verdict.

II. THE JURY WAS PROPERLY INSTRUCTED, AND THE EVIDENCE WAS SUFFICIENT, ON THE TAX FRAUD COUNT

With respect to petitioner's conviction for filing a false personal income tax return, the district court charged the jury that "[a] campaign contribution can involve a gift, loan, forgiveness of debt, advance or deposit of money or the conveyance or transfer of anything of value for the purpose of influencing the nomination or the election of any person for office." J.A. 17. Petitioner argues that the court erred by not further explaining the term, Br. 49. Petitioner also suggests that the jury may have been confused about whether it had to determine that petitioner or Agent Cormany thought the \$7000 cash payment was a campaign contribution. Br. 49-50.

In the district court, petitioner did not object to those aspects of the charge. See J.A. 26. Petitioner also did not raise this claim in the court of appeals, as he acknowledges. Br. 50. Petitioner argues, however, that his challenge to the tax fraud count raises

"subsidiary question[s]" that are "fairly included" in the question presented respecting his Hobbs Act conviction. *Ibid.*; see Sup. Ct. R. 14.1(a). In our view, it is clear that petitioner's tax fraud conviction is not properly before this Court, but in any event petitioner's contentions are entirely without merit.

The instruction on the tax fraud count made it clear that if the money received by petitioner "was a campaign contribution and * * * was used to pay campaign expenses or debts," petitioner was not required to report it as income. J.A. 19. Because the court instructed the jury that petitioner's tax return had to be knowingly false in order for his conduct to be criminal, J.A. 18, the jury must have understood that what mattered was whether petitioner treated the \$7000 cash payment as a contribution to his campaign and used it to defray campaign expenses.

Contrary to petitioner's suggestion, Br. 49, the instructions in this case are readily distinguishable from the flawed instructions that were given in *McCormick v. United States*, 111 S. Ct. 1807 (1991). In *McCormick*, the district court instructed the jury that a campaign contribution must be "voluntary" in the sense that it was "freely given without expectation of benefit." *Id.* at 1814. But a campaign contribution, as commonly understood, often is given because the payor expects some benefit. *Id.* at 1816. Thus, in *McCormick*, it was erroneously suggested to the jury that a payment that was a campaign contribution in common parlance might not be a "campaign contribution" for purposes of the Hobbs Act or the tax fraud statutes. *Id.* at 1817. In this case, by contrast, the jury was instructed as follows (J.A. 16-17):

The solicitation of campaign contributions from any person is a necessary and permissible form of

political activity on the part of persons who seek political office. Thus, the acceptance by an elected official of a campaign contribution does not, in itself, constitute a violation of the Hobbs Act even though the donor has business pending before the official.

Under this instruction, there was no suggestion that a campaign contribution was not legitimate if it was motivated by the expectation of a benefit. For that reason, unlike in *McCormick*, the instruction did not erect an improper barrier to petitioner's argument that he merely received a campaign contribution from Cormany, not a payoff.⁹ Accordingly, the risk of jury confusion that was present in *McCormick* was absent in this case.

Finally, the evidence fully supports the jury's verdict on the tax fraud count. On his personal income tax return for 1986, which was filed before he knew he was under investigation, petitioner did not report as income the \$7000 cash payment he received from Agent Cormany. Petitioner argued at trial that the \$7000 was a campaign contribution and that he had used \$4100 of it to repay a portion of an old campaign debt to his mother and the remaining \$2900 to repay himself for loans he made to his campaigns.

⁹ Of course, both a Hobbs Act violation and a tax fraud violation may be premised on the receipt of a campaign contribution. If a campaign contribution is obtained as a *quid pro quo* for a specific official act, it can result in a violation of the Hobbs Act, as the jury was instructed. J.A. 17; see *McCormick*, 111 S. Ct. at 1816-1817. Also, if money was received as a campaign contribution but converted to the defendant's personal use during the tax year, willful failure to report it on his personal income tax return for that year would constitute a false-filing offense.

With respect to those arguments, the district court instructed the jury (J.A. 19) that

if you find that the money the defendant received from Cormany was a campaign contribution and that it was used to pay campaign expenses or debts, the defendant was not required to report it as income on his federal income tax return.

The jury apparently disbelieved petitioner's claims, and for good reason. Although both Cormany and petitioner referred to the \$7000 payment as a campaign contribution, petitioner did not treat it in that manner. He did not report it; he did not record it among his contributions; and he did not use it to retire current campaign expenses. Petitioner's claim to have used the funds to reimburse his mother and himself for loans to an earlier campaign—a claim that arose only after petitioner became aware of the investigation—does little to rebut the government's contention at trial that the payment was simply a payoff dressed up in euphemistic attire. The jury was therefore entitled to conclude that the \$7000 was not a campaign contribution at all and should have been reported as personal income on petitioner's federal income tax return.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

KENNETH W. STARR

Solicitor General

ROBERT S. MUELLER, III

Assistant Attorney General

WILLIAM C. BRYSON

Deputy Solicitor General

CHRISTOPHER J. WRIGHT

Assistant to the Solicitor General

RICHARD A. FRIEDMAN

Attorney

SEPTEMBER 1991